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## Lawfully Present Lawyers

*Wendi Adelson\**

When I was nine-years old, I committed an act so sacrilegious, so unspeakable, and so nefarious that I became a threat to national security and a potential terrorist. I confess my offense: I did not resist my parents who snatched [me] from Mexico's poverty to live illegally in the United States of America. In this essay, I outline how a college education became a reality for me despite the tremendous obstacles I encountered and my struggle for immigrant rights.<sup>1</sup>

### INTRODUCTION

The quotation above is taken from an application to law school written by a dedicated and hard-working law student in my seminar on Immigrant Children Legal Representation in the fall of 2012. Valedictorian of his high school and an Eagle Scout, he was prepared for every class with sophisticated legal questions and thought-provoking analysis, and I knew him for two years as my student before he revealed to me that he was undocumented. He graduated from Florida State University College of Law with honors, and proceeded with the next logical hurdle for any law student of any immigration status: taking our state's bar exam. For Jose Manuel, he faced the additional roadblock of the need to show immigration status to apply to the Bar. He enlisted the assistance of one of his law professors, the inimitable Sandy D'Alemberte, to approach the Florida Bar and find out if they would waive the immigration status question and permit Jose Manuel to take the bar exam. The Bar waived the immigration status requirement. So, my former law student studied for, took, and passed the bar exam. And then the real challenge began: the Florida Bar was unsure about whether it could issue a license to practice law to an undocumented person,

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\* Clinical Professor, Florida State University College of Law. The author thanks the many members of her village, but most especially Jose Manuel Godinez Samperio, Michael Olivas, Marisa Cianciarulo, Sandy D'Alemberte and Patsy Palmer, Terry Coonan, Donna and Harvey Adelson, and Benjamin and Lincoln Jonah.

<sup>1</sup> This paragraph is an excerpt from Jose Manuel Godinez Samperio's application for a place at Florida State University College of Law. Appendix to Respondent's Brief at 32, Fla. Bd. of Bar Examiners Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Fla. Bar (2014) (No. SC 11-2568), *available at* [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/11/11-2568/Filed\\_03-07-2012\\_Respondent\\_Brief\\_Appendix.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/11/11-2568/Filed_03-07-2012_Respondent_Brief_Appendix.pdf).

even one who graduated from an accredited American law school and passed the Florida Bar exam. The Florida Bar petitioned the state supreme court in December 2011 for an advisory opinion to answer the following question: “Are undocumented immigrants eligible for admission to the Florida Bar?”

One potential hurdle for admission to the Florida Bar includes a finding as to good moral character.<sup>2</sup> Jose Manuel Godinez Samperio appeared to have the kind of spotless record that would make a finding as to his good moral character simple. Jose Manuel nevertheless worried: Was his illegal entrance to the United States at the age of nine with his parents enough to make his character too immoral to be a lawyer in Florida? Since Jose Manuel had fulfilled every other aspect of acquisition of a bar license in Florida and was still waiting for a decision from the Florida Bar and then the Florida Supreme Court on his case, why the holdup?

While Jose Manuel waited for a decision from the Florida Supreme Court, life continued around him. On June 15, 2012, then Department of Homeland Security Secretary Janet Napolitano issued a policy memo creating Deferred Action for Early Childhood Arrivals (DACA) for the category of young people illegally present in the United States—which Jose Manuel was a part of—the people who were brought to the United States as children and “know only this country as home.”<sup>3</sup> In her memo, Secretary Napolitano delegated to the United States Citizenship and Immigration Service (USCIS) the determination as to whether individuals who qualify for DACA would also receive a work permit.<sup>4</sup> As DACA beneficiaries, these individuals are “lawfully present” in the United States, even if only on a temporary basis. Given their lawful presence, they became potentially eligible for federal and state benefits like driver’s licenses and in-state tuition to public colleges and universities.

Jose Manuel ended up being one of those DACA-eligible young people who did receive authorization to work. The Florida Supreme Court issued an advisory opinion stating that he was nevertheless ineligible for admission to the Bar because the Florida legislature had not passed legislation authorizing

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<sup>2</sup> FLA. SUP. CT. R. 2-12, *available at* <http://www.floridabarexam.org/web/web.site.nsf/rule.xsp> (rules relating to admissions to the Bar).

<sup>3</sup> Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., et al. (June 15, 2012), *available at* <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

<sup>4</sup> *Id.* at 3.

undocumented immigrants to work in the state.<sup>5</sup> Less than two months later, the Florida legislature passed a law allowing immigrants such as Jose Manuel to be admitted to practice law.<sup>6</sup>

As both a participant and an observer in the case of Jose Manuel Godinez Samperio's efforts to obtain a license to practice law in Florida, I am writing this Article to clarify the issues involved in his case, to discuss the larger questions presented as they relate to in-state tuition and occupational licenses for those in liminal statuses, and to anticipate future changes in the law in light of the potential passage of comprehensive immigration reform.

Part I addresses DACA and the unintended consequences and questions regarding its application to a large population of previously undocumented people. I then proceed, in Part II, to examine the interconnected issues of in-state tuition for colleges and universities for the DACA population and occupational licensing. Part III contemplates the role that comprehensive immigration reform could play in the lives of DACA recipients. In sum, this paper will add to the literature and conversation about DACA recipients and lawful presence, the interplay between occupational licenses and in-state tuition, and the rights and remedies accorded to this burgeoning population of young people who are coming of age in America today.

#### I. PROSECUTORIAL DISCRETION AND DEFERRED ACTION FOR CHILDHOOD ARRIVALS

On June 17, 2011, Immigration and Customs Enforcement (ICE) Director John Morton issued a memo encouraging its agency to use prosecutorial discretion for young people brought to the United States before they came of age.<sup>7</sup> According to Morton, some appropriate factors to consider when exercising prosecutorial discretion include: the alien's length of presence in the United States; whether the alien came as a young child; the alien's pursuit of education in the United States, with particular consideration to those who have graduated from a U.S. high school or are pursuing a college or advanced degree; and the

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<sup>5</sup> Fla. Bd. of Bar Examiners Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Fla. Bar, 134 So. 3d 432, 434–35 (Fla. 2014).

<sup>6</sup> H.R. 755, § 454.021, 2014 Leg., Reg. Sess. (Fla. 2014).

<sup>7</sup> Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge, and All Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

alien's ties and contributions to the community.<sup>8</sup> On June 15, 2012, President Obama's administration created a deferred action program for childhood arrivals and the USCIS began formally accepting DACA applications on August 15, 2012.

To be eligible for DACA, a person who is otherwise in this country illegally must meet the following requirements: 1) have come to the United States before the age of sixteen; 2) have continuously resided in the United States for at least the five years preceding June 15, 2007 and be present in the United States when the DACA memo was issued; 3) be currently enrolled in school, have graduated from high school, have obtained a general education development (GED) certificate, or be an honorably discharged veteran; 4) have not been convicted of a felony, a significant misdemeanor, multiple misdemeanors, or otherwise pose a threat to national security or public safety; and 5) not be above age thirty.<sup>9</sup>

In short, DACA policy permits those individuals who arrived in the United States before the age of sixteen and who meet the other age, education, continuous presence, and lack of criminal history requirements to remain in the United States for a renewable two-year period of time and to apply for work authorization.<sup>10</sup> As the program began, it was estimated there were approximately 1.8 million immigrants in the United States who might be, or might become, eligible for the Obama Administration's "deferred action" initiative for unauthorized youth brought to this country as children.<sup>11</sup> To date, USCIS has approved more than 500,000 applications for DACA, with at least another 100,000 under review, and likely more to come.<sup>12</sup>

Advocates for the DREAM Act<sup>13</sup> and other legal remedies for undocumented students had never dreamed that a legal option as

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<sup>8</sup> *Id.*

<sup>9</sup> *Frequently Asked Questions: The Obama Administration's Deferred Action for Childhood Arrivals (DACA)*, NAT'L IMMIGR. L. CENTER (June 13, 2014), <http://www.nilc.org/FAQdeferredactionyouth.html>.

<sup>10</sup> *DACA and Driver's Licenses*, NAT'L IMMIGR. L. CENTER (June 19, 2013), <http://www.nilc.org/dacadriverslicenses.html>.

<sup>11</sup> American Immigration Council, *Who and Where the DREAMers Are, Revised Estimates*, IMMIGR. POL'Y CENTER (Oct. 16, 2012), <http://www.immigrationpolicy.org/just-facts/who-and-where-dreamers-are-revised-estimates>.

<sup>12</sup> U.S. CITIZENSHIP & IMMIGRATION SERVS., NUMBER OF I-821D, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS BY FISCAL YEAR, QUARTER, INTAKE, BIOMETRICS AND CASE STATUS: 2012-2014 FIRST QUARTER (2014), *available at* <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA-06-02-14.pdf>. A myriad of reasons prevent individuals from applying for DACA. One reason preventing application, for those otherwise eligible, is that the application is cost prohibitive.

<sup>13</sup> American Dream Act, H.R. 1751, 111th Cong. (2009).

comprehensive as DACA would exist that would confer these specific benefits to this otherwise ignored population. Although DACA is relatively new, it is only the latest incarnation of deferred action, a practice that has existed in U.S. immigration law for some time, as John Lennon was famously granted it in 1975.<sup>14</sup> Deferred Action as a status is mentioned in several places in the U.S. Code,<sup>15</sup> and various sections of the Code of Federal Regulations recognize that deferred action beneficiaries are deemed lawfully present for most purposes under federal law.<sup>16</sup>

The brand of deferred action previously in play stems from two memos issued on June 17, 2011 by ICE Director John Morton related to prosecutorial discretion.<sup>17</sup> These memos call on “ICE attorneys and employees to refrain from pursuing noncitizens with close family, educational, military, or other ties in the U.S.” for deportation and instead to spend the agency’s limited resources on those persons who pose a serious threat to public safety or national security.<sup>18</sup>

Prosecutorial discretion of the Morton Memo variety evolved into the DACA-era scheme in play at present. The principal differences between the two are eligibility for employment authorization and conferral of lawful presence. Unlike Morton prosecutorial discretion, DACA beneficiaries are eligible for an employment authorization document, or work permit.<sup>19</sup> Also, DACA confers legal presence for the time period in which an individual receives it. In contrast, prosecutorial discretion was never spelled out prior to DACA as conferring lawful presence.

<sup>14</sup> Lennon v. INS, 527 F.2d 187, 190–91 (2d Cir. 1975).

<sup>15</sup> See, e.g., 8 U.S.C. §§ 1151, 1154, 1227 (2012); 49 U.S.C. § 30,301 (2012).

<sup>16</sup> See, e.g., 6 C.F.R. § 37.3 (2014) (defining “approved deferred action status” as “lawful status” for the purpose of federal REAL ID drivers’ licenses); 8 C.F.R. § 1.3(a)(4)(vi) (2014) (defining any “[a]liens currently in deferred action status” as an “alien who is lawfully present in the United States” for the purposes of applying for Social Security benefits); 8 C.F.R. § 274a.12(c)(14) (listing “[a]n alien who has been granted deferred action” as one of the “[c]lasses of aliens authorized to accept employment”); 20 C.F.R. § 416.1618(b)(11) (2014) (listing “[a]liens granted deferred action status” as “permanently residing in the United States under color of law”); 45 C.F.R. § 152.2(4)(vi) (2013) (defining “[a]liens currently in deferred action status” as “lawfully present”).

<sup>17</sup> Prosecutorial discretion refers to ICE’s authority not to enforce immigration laws against certain individuals and groups. Memorandum from John Morton, *supra* note 7; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge, and All Chief Counsel, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.

<sup>18</sup> SHOBA SIVAPRASAD WADHIA, IMMIGRATION POLICY CTR., THE MORTON MEMO AND PROSECUTORIAL DISCRETION: AN OVERVIEW (2011), *available at* [http://www.immigrationpolicy.org/sites/default/files/docs/Shoba\\_-\\_Prosecutorial\\_Discretion\\_072011\\_0.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/Shoba_-_Prosecutorial_Discretion_072011_0.pdf).

<sup>19</sup> This cost is \$465. I-765, *Application for Employment Authorization*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/i-765> (last updated Aug. 14, 2014).

DACA has resulted in significant benefits for those who qualify, but it has also created confusion among state officials as to which state benefits, if any, should be available to DACA recipients. A lawfully present person without a foreign domicile to which he or she can return becomes eligible for driver's licenses, in-state tuition, and many of the occupational licenses.<sup>20</sup> However, states disagree as to whether DACA does in fact confer "lawful presence," and what state and federal benefits follow with that status.

## II. THE STATES ARE CONFUSED ABOUT HOW TO RESPOND TO DACA-ELIGIBLE PERSONS

Although immigration law itself is a federal question, the enactment of certain laws and policies as they affect immigrant populations is a matter for the states. Driver's licenses, in-state tuition, and professional licensing are those that most significantly impact DACA recipients. Should DACA recipients be eligible for in-state tuition? Once they graduate from college and then pursue post-secondary education, can or should these "lawfully present" individuals be granted access to certain professions through states issuing professional licenses? Should the state issue them driver's licenses so that they may commute to school and work? This section will explore the tensions inherent in those legal decisions.

### A. Driver's Licenses

A state, and not the federal government, gets to decide who is eligible to drive within its borders. For the most part, applicants for a state driver's license must provide a Social Security number, evidence of lawful immigration status, a birth certificate to determine age eligibility, and evidence of residence within that state. Because the rules governing eligibility for driver's licenses vary by state, a grant of DACA does not necessarily guarantee access to a license to drive in that state.<sup>21</sup>

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<sup>20</sup> In its "Frequently Asked Questions," U.S. Citizenship and Immigration Services (USCIS) confirmed that people granted deferred action under DACA are authorized by the Department of Homeland Security (DHS) to be present in the United States and are therefore considered to be lawfully present during the period for which they've been granted deferred action. *Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> (last updated June 5, 2014).

<sup>21</sup> DACA recipients who are granted deferred action obtain work authorization and Social Security numbers and would fit well within the general rules for driver's license issuance in almost every state. Nevertheless, states such as Arizona and Nebraska have chosen to single them out for discriminatory treatment. *DACA and Driver's Licenses*, *supra* note 10; see also *Fifty-State Survey*, *infra* app. (The author has compiled a fifty-state survey outlining each state's policies on granting DACA recipients driver's

Even though driver's licenses are ostensibly a state issue, since drivers often cross state borders, this movement creates an interstate issue that implicates federal law. The REAL ID Act of 2005 is a federal law that includes guidance for states when issuing driver's licenses to noncitizens.<sup>22</sup> As part of that guidance, the REAL ID Act specifically lists "deferred action," of which DACA is a type, as a lawful status that would permit the issuance of a federally recognized driver's license, valid during the period of authorized stay in the United States.<sup>23</sup>

In most states, DACA recipients who obtain an employment authorization document<sup>24</sup> and a Social Security number are likely to be eligible for a driver's license, provided they produce the rest of the required documentation. But a few state officials have announced that they will ignore or alter their state's rules by denying licenses to DACA youth, and some states already impose restrictive document requirements.<sup>25</sup>

Navigating life without a driver's license makes everything more challenging for a DACA recipient. Certainly, obtaining a driver's license facilitates a person's ability to work or attend

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licenses, in-state tuition, and occupational licenses. In gathering this information, the author referenced the National Immigration Law Center's information on driver's licenses and in-state tuition, as well as each individual state's supreme court precedent on admitting undocumented individuals to the state's bar. Please note that any "N/A" designation was assigned by the author for any state policies that were unable to be located at the time the survey was compiled and thus are "not addressed" by applicable state legislation. All information contained in this document is on file with the author.).

<sup>22</sup> *DACA and Driver's Licenses*, *supra* note 10.

<sup>23</sup> Real ID Act of 2005, Pub. L. No. 109-13, § 202(c)(2)(B)(viii), 119 Stat. 311, 313.

<sup>24</sup> Most states list EADs specifically in their statutes or motor vehicles department website as proof of lawful presence (e.g., AL, CA, CO, CT, DE, DC, FL, GA, HI, ID, IL, KS, KY, LA, ME, MD, MA, MI, MN, MO, MT, NH, NJ, NY, NC, ND, OR, PA, RI, SC, SD, TN, UT, VT, WI, WY). Arizona and Nebraska also list EADs as meeting an eligibility requirement, but have announced that DACA recipients are not eligible for licenses, even if they have an EAD. *DACA and Driver's Licenses*, *supra* note 10; *see also* Fifty-State Survey, *infra* app.

<sup>25</sup> *DACA and Driver's Licenses*, *supra* note 10. Arizona made DACA recipients ineligible for licenses through its Motor Vehicle Division, which revised its list of identity documents to exclude EADs obtained by DACA recipients, while preserving eligibility for all other individuals with EADs.

The exclusion by Arizona and Nebraska has been challenged in litigation, as was an exclusion imposed by Michigan state officials. However, the Michigan secretary of state announced on February 1 that the state would reverse its policy and resume issuing driver's licenses to individuals granted DACA. North Carolina briefly stopped issuing drivers' [sic] licenses to DACA grantees while awaiting an opinion from the state attorney general. The attorney general concluded that, although they do not have a formal immigration status, people granted DACA are lawfully present in the U.S. and are therefore eligible for a state driver's license. Although the state Department of Transportation decided to resume its policy of issuing licenses to this group, the licenses are now marked "LEGAL PRESENCE NO LAWFUL STATUS."

*Id.*



classes; but from a community perspective, disseminating driver's licenses better serves the public interest in having trained and tested drivers on the road.<sup>26</sup> States continue to debate DACA eligibility for driver's licenses and a lack of uniformity on this issue persists, making the benefits associated with a DACA grant different depending on the state where you live. The same inconsistency exists with respect to in-state tuition.

#### B. In-State Tuition

In a time of shrinking state budgets and fewer job opportunities for college graduates, state colleges and universities are wrestling with the question of what benefits to bestow upon DACA recipients.<sup>27</sup> The question of in-state tuition as it applies to DACA recipients has led to different solutions in states across the country.<sup>28</sup> Currently, approximately forty of the states have a provision that allows for undocumented students to receive in-state tuition, but two do not, and two states do not permit undocumented students even to enroll at their state's post-secondary institutions.<sup>29</sup>

Some of these DACA-eligible young people are high school valedictorians, raised in the United States, and eager to contribute to our economy and our society; to choose not to let them enroll in their closest public university is short-sighted, if only from an economic perspective. The same anti-immigrant sentiment that denies college to individuals will also inspire a decision to deny post-college employment.

To date, at least seventeen states have made it possible for students who have attended primary schools in the United States to pay the same in-state tuition as their American-born counterparts at public institutions of higher education.<sup>30</sup> In direct contrast, some states have officially opposed in-state tuition for DACA recipients, stating, as Virginia's State Council of Higher Education did, that DACA beneficiaries should be considered

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<sup>26</sup> *Id.*

<sup>27</sup> Allie Bidwell, *Colleges Get More State Funds, but Rely on Tuition*, U.S. NEWS & WORLD REP. (Apr. 21, 2014, 6:45 PM), <http://www.usnews.com/news/articles/2014/04/21/states-increase-higher-education-spending-rely-on-tuition-in-economic-recovery>.

<sup>28</sup> *Undocumented Student Tuition: State Action*, NAT'L CONF. ST. LEGISLATURES (June 12, 2014), <http://www.ncsl.org/research/education/undocumented-student-tuition-state-action.aspx>.

<sup>29</sup> Gilberto Mendoza, *Tuition Benefits for Immigrants*, NAT'L CONF. ST. LEGISLATURES (July 15, 2014), <http://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx>.

<sup>30</sup> NAT'L IMMIGRATION LAW CTR., BASIC FACTS ABOUT IN-STATE TUITION FOR UNDOCUMENTED IMMIGRANT STUDENTS 1 (2014), available at <http://www.nilc.org/document.html?id=170>.

“non-residents” for purposes of qualifying for in-state tuition for Virginia colleges and universities.<sup>31</sup> These institutions grant in-state tuition status to Virginia “domiciliaries.” And Virginia law defines “domiciliary intent” as the “present intent to remain [in Virginia] indefinitely.”<sup>32</sup> Virginia has granted driver’s licenses to DACA beneficiaries, but not provided for in-state tuition.<sup>33</sup> This decision by Virginia’s State Council of Higher Education is at odds with the structure of the DACA program, which is “presently structured as indefinitely renewable, such that [a] . . . DACA beneficiary can form a reasonable present legal intent to remain indefinitely”<sup>34</sup> satisfying the “domiciliary intent” requirement for in-state tuition in Virginia.

The question as to whether a DACA recipient can attend a public post-secondary institution, let alone receive in-state tuition, hinges on the meaning of “lawful presence.”<sup>35</sup> A grant of DACA confers a temporary period of lawful presence. The difference between DACA and say F1, J, or other nonimmigrant statuses is that DACA recipients do not maintain a foreign domicile and have no intent to return to a country to which they have no meaningful ties. Provided that a lawfully present DACA recipient meets the durational requirement for tuition in that state, no legal reason exists to deny them this benefit.

In a recent Georgia case, the question turned on an issue apart from lawful presence. A Georgia state trial court granted the University System of Georgia’s Board of Regents’ motion to dismiss against DACA beneficiary Georgia college students seeking in-state tuition, finding that the Board is protected from suit by sovereign immunity. However, in addressing the “lawful presence” question, the court made some interesting observations that work in favor of viewing DACA recipients as lawfully present and therefore eligible for in-state tuition, in theory. First, the court acknowledged that “[t]he fact that Georgia allows DACA recipients to obtain a driver’s license, a public benefit for which lawful presence must be verified, seems to support [the] Plaintiffs’ contention that the State regards them as being

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<sup>31</sup> Complaint for Declaratory Relief at 2, *Orellana v. State Council of Higher Educ. for Va.*, No. CL13003086-00 (Va. Cir. Ct. Dec. 17, 2013), *available at* [https://www.justice4all.org/wp-content/uploads/2013/12/Orellana\\_v\\_SCHEV.pdf](https://www.justice4all.org/wp-content/uploads/2013/12/Orellana_v_SCHEV.pdf).

<sup>32</sup> VA. CODE ANN. § 23-7.4(A) (2014).

<sup>33</sup> See Fifty-State Survey, *infra* app; see also *DACA and Driver’s Licenses*, *supra* note 10; *Mendoza*, *supra* note 29.

<sup>34</sup> Complaint for Declaratory Relief, *supra* note 31, at 11 ¶ 29.

<sup>35</sup> See *Undocumented Student Tuition: State Action*, *supra* note 28. “Indiana enacted HB 1402 requiring that students be lawfully present to receive in-state tuition benefits.” *Id.* Also, “[i]n October 2010, Georgia’s State Board of Regents passed new rules regulating the admission of undocumented students. The 35 institutions in the University System of Georgia must verify the ‘lawful presence’ of all students seeking in-state tuition rates.” *Id.*

lawfully present.”<sup>36</sup> The court further emphasized the obfuscation of the issue of lawful presence, terming it “bureaucratic doublespeak” that the Board allows “driver’s licenses to constitute verification of lawful presence, but the very individuals that [the] Defendants contend are not lawfully present may obtain a Georgia driver’s license as a result of DACA.”<sup>37</sup> Although the court declared that the “ambiguity of the policies at issue and how ‘lawful presence’ is being construed cry out for judicial clarification,” that clarification is precluded by sovereign immunity in that case. The court, however, closed by noting the reality that DACA recipients can live, work, and drive legally in Georgia, which arguably precludes a determination that they are “unlawfully” present. Whether granting or denying access to a public college or university, it does raise the question of what comes next for DACA-eligible young people.

### C. Occupational Licensing

In the case of my former law student, Jose Manuel, the Florida Supreme Court certified that the question of whether an undocumented person who graduates from an accredited U.S. law school and passes the bar in Florida should be issued a license to practice created a conundrum for the Florida Board of Bar Examiners and the Florida Supreme Court. For the purposes of this paper, we will limit the discussion of immigration status and occupational licensing to the practice of law, but recognize that it has broader application to the fields of medicine, dentistry, and beyond.<sup>38</sup>

Expanding or ensuring access to certain occupational licensing for undocumented persons, to some, is a logical “extension of other measures enacted in recent years that provide such immigrants with driver’s licenses, lower college tuition and access to public financial aid and private funds held by the state

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<sup>36</sup> DACA Beneficiary Ga. Coll. Students v. Univ. Sys. of Ga.’s Bd. of Regents, No. 2014cv243077, at 13 (Ga. Sup. Ct. Fulton Co. 2014), *appeal docketed*, No. A14A2352 (Ga. Ct. App. Aug. 15, 2014).

<sup>37</sup> *Id.* at 14–15 (stating that an EAD operates similarly to a driver’s license in that various Georgia departments and agencies permit an individual to present an EAD to establish lawful presence in the state of Georgia).

<sup>38</sup> 8 U.S.C. § 1621(d) (2012); *Bill Would Allow Undocumented Immigrants to Practice Health Care*, CAL. HEALTHLINE (May 12, 2014), <http://www.californiahealthline.org/articles/2014/5/12/bill-would-allow-undocumented-immigrants-to-practice-health-care>; Steve Bousquet, *Senate Supports Landmark Bid for Law License by Non-Citizen*, TAMPA BAY TIMES (Apr. 24, 2014), <http://www.tampabay.com/blogs/the-buzz-florida-politics/senate-supports-landmark-bid-for-law-license-by-non-citizen/2176704> (“D’Alemberte has noted that Florida routinely licenses doctors and many other professionals who are not U.S. citizens.”).

universities.”<sup>39</sup> To others, the question of who qualifies for occupational licenses issued by a state turns on proper interpretation of section 1621 of title 8 of the U.S. Code (“1621”), referring to aliens who are not qualified aliens or nonimmigrants ineligible for State and local public benefits, one of which is a professional license.<sup>40</sup> 1621 basically states that noncitizens are ineligible for state or local benefits, but also contains a subsection expressly authorizing a state to render a noncitizen eligible to obtain a professional license through the enactment of a state law meeting specified requirements.<sup>41</sup> California and Florida have recently dealt with the application of 1621 to bar admission for lawyers who are undocumented or lawfully present as DACA recipients.

### 1. California

In the beginning of January 2014, the California Supreme Court ruled that undocumented immigrant Sergio Garcia could be licensed to practice law in that state. The court rejected the claim that undocumented immigration status makes a bar applicant per se ineligible for a bar license. A product of the California public elementary and secondary schools, Garcia put himself through college, and then attended an unaccredited law school in California. Garcia passed the California bar exam on the first try and then passed the moral character portion of the Bar.<sup>42</sup> In the spring of 2012, the California Supreme Court issued an order to show cause why Garcia should be admitted to practice law and invited briefing on a number of immigration law and policy issues. In its briefing on the issue, the Obama administration opposed Garcia’s admission, claiming that federal law required an affirmative legislative enactment in order to license an undocumented immigrant to practice law.<sup>43</sup> In September 2013, the court held oral arguments and many questions centered on whether a state legislative enactment was necessary. To address the issue, the California legislature with bipartisan support quickly passed a law, signed by Governor

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<sup>39</sup> Patrick McGreevy, *California Bill Would Ease Professional Licensing Rules for Immigrants*, L.A. TIMES, May 12, 2014, at A1, available at <http://www.latimes.com/local/la-me-immigrants-doctors-20140512-story.html>.

<sup>40</sup> *In re Garcia*, 315 P.3d 117, 132 (Cal. 2014).

<sup>41</sup> *Id.*; 8 U.S.C. § 1621(d) (2012).

<sup>42</sup> *In re Garcia*, 315 P.3d at 448. Garcia had fully disclosed on his bar application that he was undocumented. He was brought to the United States by his undocumented immigrant parents from Mexico when he was a toddler. His parents have since regularized their immigration status, and Garcia, who has filed all of the necessary paperwork, is awaiting a visa to be issued to him. *Id.*

<sup>43</sup> Application and Proposed Brief for Amicus Curiae the United States of America at 5–12, *In re Garcia*, 315 P.3d 117 (Cal. 2014) (No. S202512), 2012 WL 3822246, at \*5–12.

Jerry Brown, rendering undocumented immigrants eligible to practice law.<sup>44</sup> The California Supreme Court invited further briefing on the question of the effect of the California legislature's action. After briefing was completed, the court issued its opinion, one day after the legislative enactment went into effect.<sup>45</sup>

The California Supreme Court in the Garcia case had certified the question: Does 8 U.S.C. section 1621(c) apply and preclude this court's admission of an undocumented immigrant to the State Bar of California? Does any other statute, regulation, or authority preclude the admission? They then found that in light of the recent enactment of legislation permitting Garcia to practice law,<sup>46</sup> the court did not need to determine the validity of the parties' contentions with regard to the proper interpretation of section 1621(c)(1)(A). In those states where lawyers who are undocumented or lawfully present due to DACA have yet to apply for bar admission, what should a court do in the absence of legislative action? For those cases of first impression yet to come, some analysis is warranted.

I join the contention that once an individual is lawfully present, 1621 and 1623 no longer apply.<sup>47</sup> "No federal statute precludes a state from issuing a law license to an undocumented immigrant."<sup>48</sup> Yes, California passed a prophylactic statute for Sergio Garcia, but for DACA recipients like Jose Manuel Godinez Samperio, once they have their EAD (or authorization to work through their immigration status), they should be considered the same as those individuals granted Temporary Protected Status (TPS),<sup>49</sup> or Advanced Parole,<sup>50</sup> or permanently residing under color of law (PRUCOL),<sup>51</sup> who are all eligible for professional licenses given their lawfully present status.

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<sup>44</sup> S. 1024, 2014 Leg., Reg. Sess. (Cal. 2014).

<sup>45</sup> Kevin R. Johnson, *Breaking News: California Supreme Court Approves Bar License for Sergio Garcia*, IMMIGRATIONPROF BLOG (Jan. 2, 2014), <http://lawprofessors.typepad.com/immigration/2014/01/california-supreme-court-approves-bar-license-for-sergio-garcia.html>.

<sup>46</sup> CAL. BUS. & PROF. CODE § 6064 (West 2003 & Supp. 2014).

<sup>47</sup> See Katherine Tianyue Qu, *Passing the Legal Bar: State Courts and the Licensure of Undocumented Immigrants*, 26 GEO. J. LEGAL ETHICS 959, 977 (2013) ("Whether they receive work authorization through DACA, future laws, or some other avenue, the applicants will be able to lawfully obtain employment. In addition, any alterations to the current immigration system will likely lead to the repeal of existing statutes—including possibly 8 U.S.C. § 1621.").

<sup>48</sup> *In re Garcia*, 315 P.3d 117, 132 (Cal. 2014).

<sup>49</sup> See generally 8 U.S.C. § 1254a (2012).

<sup>50</sup> See generally *id.* § 1182(d)(5).

<sup>51</sup> See generally 20 C.F.R. § 416.1618 (2014).

## 2. Florida

In March 2014 the Florida Supreme Court considered the question of whether a DACA recipient with work authorization<sup>52</sup> who passed the bar exam could be granted a law license. The question turned largely on the court's interpretation of section 1621 of Title 8 of the U.S. Code. The applicant for admission, Jose Manuel Godinez Samperio, argued that 1621 did not prevent the state of Florida from issuing him a license to practice law because Florida's constitutional provision authorizing Florida to license attorneys overcomes 1621(d)'s requirement that states have a specific law granting particular benefits to undocumented immigrants.<sup>53</sup> The Supreme Court of Florida disagreed, finding that 1621 requires a state wishing to confer a benefit such as a public license on an undocumented immigrant to pass legislation specifically authorizing such a benefit.<sup>54</sup> In response, the Florida legislature on May 2, 2014 passed HB 755, a bipartisan bill<sup>55</sup> which specifically authorized the Florida Bar to license undocumented immigrants who were brought to the United States as minors, have lived in the United States for at least ten years, are eligible for DACA, and are qualified for admission to the Bar to be admitted.<sup>56</sup> Upon passing the law, the Florida House of Representatives gave Jose Manuel a standing ovation.<sup>57</sup>

### III. THE FUTURE OF DACA WITH RESPECT TO COMPREHENSIVE IMMIGRATION REFORM

Almost twenty years have passed since the last big immigration overhaul in 1996. Since that legislative effort, the country has seen an enforcement-led policy, and a system that

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<sup>52</sup> *In re Garcia*, 315 P.3d at 130 ("We conclude the fact that an undocumented immigrant is present in the United States without lawful authorization does not itself involve moral turpitude or demonstrate moral unfitness so as to justify exclusion from the State Bar, or prevent the individual from taking an oath promising faithfully to discharge the duty to support the Constitution and laws of the United States and California.").

<sup>53</sup> Applicant/Respondent's Response to Questions from the Court, at 9–10, Fla. Bd. of Bar Examiners Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Fla. Bar, 134 So.3d 432 (Fla. May 17, 2013).

<sup>54</sup> Fla. Bd. of Bar Examiners Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Fla. Bar, 134 So.3d 432, 434–35 (Fla. 2014).

<sup>55</sup> Senators Darren Soto, D-Orlando, and David Simmons, R-Altamonte, sponsored the Senate amendment that would support Jose Manuel's acquisition of a Florida Bar license. Steve Bousquet, *Florida Senate Supports Landmark Bid for Law License by Non-citizen*, MIAMI HERALD (Apr. 25, 2014, 4:05 PM), <http://www.miamiherald.com/news/state/article1963385.html>.

<sup>56</sup> H.R. 755, § 454.021, 2014 Leg., Reg. Sess. (Fla. 2014).

<sup>57</sup> Steve Bousquet, *Historic Vote in House Clears Way for Noncitizen to Practice Law*, TAMPA BAY TIMES (May 1, 2014), <http://www.tampabay.com/blogs/the-buzz-florida-politics/historic-vote-in-house-clears-way-for-noncitizen-to-practice-law/2177833>.

does not respond well to the changing economic needs of our nation. Nevertheless, comprehensive immigration reform remains elusive.

If comprehensive immigration reform does come to pass, there are several possibilities for DACA's continued viability. One possibility is that comprehensive immigration reform legislation will adopt and expand DACA as part of an earned legalization program. Some experts postulate that comprehensive immigration reform legislation might contain a provision placing DACA recipients at the front of the line for adjusting their statuses to that of permanent residents.<sup>58</sup> If that happens, then DACA grantees could petition for their parents when they turn twenty-one.

Some argue that the continuation of DACA is uncertain, as it is contingent on who gets voted into office in 2016. Whoever the next president is, the likelihood of rescinding DACA for more than 700,000 kids is negligible. Unless they leave the country or commit crimes, DACA beneficiaries will likely retain that status for life. If comprehensive immigration reform comes to pass, DACA-eligible individuals will likely have more legal remedies available to them, not fewer. Nevertheless, it is important to acknowledge that DACA is not a panacea or an enduring substitute for comprehensive immigration reform.

#### CONCLUSION

Jose Manuel Godinez Samperio can now legally work, drive, and practice law. He is eager to be the attorney, instead of the client, in his future cases. Jose Manuel Godinez Samperio in Florida and Sergio Garcia in California will not be the last two individuals, or states, to confront these questions of lawfully present lawyers in the United States in a post-DACA world. States can choose to deny this population access to driver's licenses or in-state tuition, but they can also choose to comply with state and federal law and policy and ensure streamlined access to education, licensure, work, transportation, and mobility to harvest the talent that we have already planted in this generation of U.S. educated students and young professionals.

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<sup>58</sup> Telephone Interview with Michael Olivas, Dir., Inst. of Higher Educ. Law & Governance, Univ. of Hous. Law Ctr. (May 3, 2014).